

THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2)(b)

Writ Petition No. 436(S/B) 2003

Date of decision: 22.08.2003

For the approval of:

Hon. S.J.Kapadia, C.J.

Hon. Rajesh Tandon, J.

-Whether the order/judgment should be sent to the
reporters for reporting? (Yes)

-Whether the reporters be allowed
to see the judgment? (Yes)

Jt. PPS

THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition no. 436(S/B) of 2003

DR- 1063N Lt. Col. M.K. Mahapatra,
Military Dental Centre, Ranikhet

.....Petitioner

Versus

Government of India through Secretary,
Ministry of Defence, New Delhi, and another

----- Respondents

Mr. S.N. Babulkar, Advocate for the petitioner.
Sri G.S. Bist, Advocate for the respondents

**Coram: Hon. S.H.Kapadia, C.J.
Hon.Rajesh Tandon, J.**

Date: 22.08.2003

ORAL JUDGEMENT [Per S.H.Kapadia, C.J.]

Rule.

Respondents waive service.

By this petition, the petitioner Dr.(Lt. Col) M.K. Mahapatra has challenged the order passed by the Court Martial on 1.8.2003, whereby the petitioner has been sentenced to be Cashiered with imprisonment for three months on the ground that the entire proceedings were without jurisdiction.

The petitioner was posted as a doctor in Military Dental Centre, Ranikhet attached to Kumaon Regiment. He was commissioned on 29.5.1983. On 25.5.1998, he was promoted to the post of Lieutenant Colonel. On 16.11.2000, an incident took place under which it is alleged that the petitioner has molested a woman patient. Suffice it to state that the petitioner was charge-sheeted for molestation on 20.05.2003. On 22.06.2003, approval was given by the Major General to the commencement of trial. The trial commenced on 16.7.2003. However, on 15.7.2003 before the commencement of trial, the petitioner was arrested and taken in close custody. By order dated 1.8.2003, the petitioner was sentenced to three months imprisonment and he has been cashiered i.e. dismissed with disgrace, by the impugned order. Till today, the competent authority has not confirmed the sentence imposed upon the petitioner as required under section 15 of the Army Act, 1950, which states that finding and sentence composed by the Court Martial shall not be valid unless confirmed.

This petition came for the first time for admission on 11.8.2003. In the petition, it was argued that the Judge Advocate was an officer in the Army who was holding a rank below that of the Lieutenant Colonel and, therefore, the order passed by the General Court Martial is without jurisdiction. In this connection, reliance has been placed on the judgment of the Supreme Court in the case of Union of India and others Vs. Charanjit S. Gill and others reported in 2000(5) S. C. C. page 742. In the said judgment, it has been held by the Supreme Court that the Judge Advocate associated with the Court Martial cannot be an officer of the rank lower than that of the officer facing the trial. However, in exceptional cases where the convening authority is of the opinion that the officer of such rank is not available and if such opinion is specifically recorded in the order, then in appropriate case the Judge Advocate associated with the Court Martial can be an officer of a rank lower than that of the officer facing trial.

In this case an affidavit has been filed on behalf of the respondent stating that in this case the exception carved out in the judgment of the Supreme Court hereinabove is applicable; that the Judge Advocate in this case was of a rank lower than that of the officer facing trial because there was no other officer available of the rank equal to that of the petitioner or of the rank above that of the petitioner. We may mention that we do not wish to give any opinion on this point at this stage because the Confirming Officer till date has not taken any decision on the confirmation of findings and sentence imposed by the Court Martial. Moreover, the petitioner has a right to petition under section 164 of the Army Act, 1950, in which he can take this plea.

However, the most relevant point which arises for consideration in this petition which was not raised, but which we have allowed the petitioner to raise orally, is whether the close custody of the petitioner from 15.7.2003 is in accordance with law. For this purpose, the matter was adjourned twice to enable the learned counsel for respondents to take instructions. This point is relevant because it concerns the freedom of a citizen. This point is important because from 15.7.2003 till today the petitioner continues to remain under arrest without any orders being passed by the Confirming Officer. For this purpose we need to discuss

the scope of the Act. Chapter XII of the Army Act 1950 deals with Confirmation and Revision. Section 153 of the Army Act states inter alia that finding and sentence are not valid unless confirmed as provided under the Act. Under section 154, the findings and sentences of the Court Martial (GCM) are required to be confirmed by the Central Government or by any officer empowered in this behalf by the Central Government. The Confirming Authority has also the power to reduce the sentence imposed by the G.C.M. under section 158 of the Act. Under section 160 of the Act finding or sentence of G.C.M. which requires confirmation can be revised by the Confirming Officer. Under section 164 of the Army Act, any person aggrieved by the order passed by the G. C. M. can present a petition to the Confirming Officer and the Confirming Office shall take steps as he may consider necessary to satisfy itself as to the correctness, legality or propriety of the order passed by the G. C. M. Under section 165 of the Army act, the Central Government or any prescribed officer or Chief of the Army Staff is empowered to annul the proceedings of any Court Martial on the ground that they are illegal or unjust. At this stage, we may mention that under Regulation 391(a), it is inter alia provided that any person who is subject to military law, when charged with an offence punishable under the Army Act, may be taken into the military custody. In other words, on filing of the charge sheet, any person accused of offence punishable under the Army act may be taken into military custody. This is an enabling provision. Under Regulation 391(b) such arrest at the stage of filing of the charge sheet shall be either close arrest or open arrest. In this case before the commencement of the trial, the petitioner was put in close arrest on 15.7.2003, whereas the trial commenced on 16.7.2003. Under Regulation 392(b), it is inter alias provided that any officer may be placed under arrest by a competent authority, when charged with the offence, but he will not be placed under arrest by any authority other than his Commanding Officer unless discipline so requires. Under Regulation 392(b), it is further provided that any officer may be placed under arrest at the time of filing of the charge sheet under the orders of his Commanding Officer provided he is satisfied that such arrest is

warranted by the circumstances of the case. Under Regulation 392(j), it is inter alia provided that when an accused is remanded for trial by the Court Martial, the question of arrest is a matter of discretion vested in the Commanding Officer. And it shall be the duty of Commanding Officer to decide whether the accused should be put under open or close arrest having regard to all the circumstances of the case. Under Regulation 392(I), it is inter alia provided that where the sentence awarded in the open Court is imprisonment and if accused is already under close arrest, he will continue to remain under close arrest and if he is not under close arrest he will be taken into custody, unless the Confirming Officer directs otherwise.

At the outset, we may mention that in this case the controversy centers around the close arrest of the petitioner on and from 15.7.2003, which is prior to the commencement of the trial. It is argued on behalf of the petitioner that close arrest dated 15.7.2003 is contrary to Regulation 391 and 392(b)(j)(1). On the other hand, it has been argued on behalf of the respondent no. 1 that under section 167 of the Army Act, a sentence of imprisonment commenced on and from 1.8.2003 when the petitioner was sentenced for three months imprisonment by the Court Martial, and, therefore, no interference was called for under Article 226 of the Constitution. In this connection, reliance was placed on the judgment of the Supreme Court in the Case of Union of India Vs. Sunil Kumar Sarkar reported in 2001 A.I.R. SCW page 957 (vide para 7).

In this case a peculiar situation has arisen. In this case, we are concerned with the validity of the Close Arrest dated 15.7.2003. In this case, the petitioner has been under Close Arrest from 15.7.2003 till date. In this case, the trial commenced only on 16.7.2003. Therefore, the petitioner was placed under Close Arrest prior to commencement of the trial. At the stage of the charge-sheet, an officer can be put under arrest. However, under Regulation 392(b), his Commanding Officer should be satisfied that it is necessary to arrest him. Despite opportunity to the respondents, till date we do not know the circumstances under which the petitioner was put under arrest on 15.7.2003. We are not told as to whether he is put under Close Arrest by his Commanding Officer or by

any other authority as mentioned in Regulation 392(b). Till today, the sentence has not been confirmed by the Confirming Officer. The petitioner was sentenced for three months imprisonment on 1.8.2003. This order dated 1.8.2003 was subject to confirmation (see page 37 of the paper book). On the same date, he has made a representation to the Confirming Officer. That representation is not disposed of by the Confirming Officer till today. Under Regulation 392(j), the Commanding Officer has to decide whether Close Arrest is warranted, after taking into account circumstances of each case. Even under Regulation 392(I), it is provided that where the sentence awarded is imprisonment, the accused if not under Close Arrest will be taken into custody and if he is under Close Arrest, he will continue to remain under Close Arrest unless the Confirming Officer directs otherwise. No decision has been taken by the Confirming Officer under Regulation 392(b), (j) or (1) till today. The petitioner has been sentenced to three months imprisonment by order dated 1.8.2003. More than one month has elapsed from 15.7.2003 when the petitioner was kept under Close Arrest. The Confirming Officer till today has not decided on the representation of the petitioner, which he has made to the Confirming Officer on 1.8.2003 as required by section 164(1). The petitioner has also a right to move Central Government under section 164(2). In the circumstances, we do not have any basis before us for putting the petitioner in this case under Close Arrest before the conviction by the Court Martial. In the circumstances, the judgment of the Supreme Court in the case of Union of India Vs. Sunil Kumar Sarkar (Supra) has no application to the facts of this case.

In the peculiar facts and circumstances of this case, we pass the following order:

ORDER

- (i) The petitioner, who is in Close Arrest shall be released forthwith.

- (ii) The Confirming Officer shall decide the issue of confirmation of finding and sentence imposed by the GCM under section 154 within three weeks from today. He will also decide the question whether the Court martial was properly convened keeping in mind the judgment of the Supreme Court in the Case of Union of India Vs. Charanjit Singh Gill(supra), as also in the light of the counter affidavit filed by the respondents stating that at the relevant time there was no officer available above the rank of Lieutenant Colonel to act as a Judge Advocate.
- (iii) This judgment has been given in the peculiar facts of this case. It will not be cited as a precedent in every matter. It is confined to the facts of this case. On merits, we do not wish to express any opinion. However, if any adverse order is passed by the Confirming Officer, then the petitioner shall exhaust statutory remedy under the Army Act, 1950.

Accordingly, the writ petition is disposed of. No order as to costs.

Let the certified copy of this order be expedited.

(Rajesh Tandon, J.) (S.H.Kapadia, C.J.)

AK: